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In the Supreme Court of the United States

OCTOBER TERM, 1985

ILLINOIS COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 214(b) of the Staggers Rail Act of 1980, 49 U.S.C. 11501(b), permits a state to seek certification from the Interstate Commerce Commission (ICC) to regulate certain intrastate aspects of ICC regulated railroads. The ICC certifies the state regulatory program if the state standards and procedures are in accordance with their federal counterparts. The question presented is whether the ICC may require, as a condition of certification, that a state adopt the regulatory exemptions that the ICC applies to interstate traffic when the state regulates the same class of intrastate traffic.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 749 F.2d 875. The decision of the Interstate Commerce Commission (Pet. App. 40a-53a) is reported at 367 I.C.C. 149.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1984. A petition for rehearing was denied on February 20, 1985 (Pet. App. 38a). The petition for a writ of certiorari was filed on May 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Interstate Commerce Commission (ICC) is presently implementing the provisions of the Staggers Rail Act of

1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, that establish a new framework for intrastate rail transporation regulation. Petitioners challenge an ICC interpretation of the Act's state certification provisions governing a state's authority to regulate the intrastate traffic of ICC regulated railroads. In particular, petitioners object to the ICC's requirement that states must adopt the regulatory exemptions that the ICC applies to interstate traffic when they regulate the same class of intrastate traffic.

1. The Staggers Rail Act effects comprehensive changes in railroad regulation designed "to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." 49 U.S.C. 10101a note. Congress, recognizing that the railroad industry's earnings "are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements" (*ibid.*), sought to improve the industry's financial health by reducing outmoded regulation. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79-80 (1980). The framers of the legislation specifically observed that burdensome state regulatory policies contributed to the industry's financial difficulties. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 128-130 (1980).[1]

Sections 213 and 214 (94 Stat. 1912, 1913) of the Staggers Rail Act respond to the problem of federal and state regulatory burdens. Section 213, codified at 49 U.S.C. 10505, substantially broadens the ICC's power to exempt rail transportation from regulation while Section 214, codified

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[1]For example, the House Report noted a great disparity in the revenue-to-variable cost ratios between federally regulated interstate traffic and state regulated intrastate traffic. It suggested that this disparity, in 1977 alone, reflected a $400 million reduction in railroad revenues attributable to state regulation. H.R. Rep. 96-1035, *supra*, at 61.

at 49 U.S.C. 11501, fundamentally alters the federal-state relationship in intrastate rail regulation. The interpretation of these two sections is at issue in the present case.

Section 213, following a trend initiated in 1976,[2] expands the ICC's authority to provide railroads with regulatory exemptions. Specifically, Section 213 states that the ICC, in a matter related to a rail carrier subject to its jurisdiction, shall exempt a person, class of persons, or a transaction or service when the Commission finds that (1) regulation is not necessary to carry out the national railroad transportation policy, and (2) the transaction is of limited scope, or regulation will not be necessary to protect shippers from abuses of market power. 49 U.S.C. 10505(a); see Pet. App. 107a. The legislative history indicates that Congress considered these provisions an "important cornerstone" of the Staggers Rail Act that charge the ICC "with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards." H.R. Rep. 96-1035, *supra,* at 60.[3]

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[2]See Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 207, 90 Stat. 42 (permitting the ICC to exempt from regulation transactions relating to railroad service if, because of the limited scope of the transaction, regulation did not appear to be necessary). See also *Rail General Exemption Authority—Fresh Fruit & Vegetables,* 361 I.C.C. 374 (1979).

[3]The Conference Report specifically states (H.R. Conf. Rep. 96-1430, *supra,* at 105):

> The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation.

Section 214 addresses the financial burdens imposed by state regulation, increasing the ICC's role in intrastate rail matters while reducing the jurisdiction and discretion of the states. See 49 U.S.C. 11501; Pet. App. 108a-115a. Section 214(b) (94 Stat. 1913) completely removes state jurisdiction over certain rate actions concerning ICC regulated railroads. 49 U.S.C. 11501(b)(6). It permits states to regulate other types of intrastate rail transportation activities subject to ICC authority only if the states exercise jurisdiction exclusively in accordance with the provisions governing ICC regulation. 49 U.S.C. 11501(b)(1).

Of particular importance in the present case, Section 214(b) provides that a state wishing to regulate these activities must receive certification from the ICC. State authorities seeking certification must submit for ICC review their "standards and procedures" governing intrastate rail regulation. 49 U.S.C. 11501(b)(2). If the ICC determines that "such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the [ICC under Title 49 of the United States Code,]" it shall certify the state authority. 49 U.S.C. 11501(b)(3)(A). However, if the ICC determines that the standards and procedures "are not in such accordance," it must deny certification. *Ibid.* Denial of certification disables the state from exercising jurisdiction over the intrastate rail activities. 49 U.S.C. 11501(b)(4)(A). Even if the state receives certification, a railroad aggrieved by state regulation may seek relief from the ICC on the ground that the standards and procedures applied by the state were not in accordance with their federal counterparts. 49 U.S.C. 11501(c).

2. Following passage of the Staggers Act in October 1980, Illinois and 39 other states applied for certification. The ICC determined that many of the states' proposed

standards and procedures failed to comply fully with federal law. Sympathetic to the states' problems in understanding a new statute, the ICC elected to "provisionally certify" the 40 states, conditioning final approval upon full compliance with the Act's requirements. 364 I.C.C. 881 (1981); Pet. App. 91a-99a.

Illinois later amended its proposed standards and procedures and included, among other proposals, that "[a]n exemption granted for a class of interstate traffic shall not automatically apply in Illinois" (Pet. App. 56a-57a). In August 1982, the ICC tentatively concluded that Illinois' proposals would comply with federal standards and procedures. 365 I.C.C. 855 (1982); Pet. App. 54a-60a. However, the ICC published Illinois' standards and procedures for comment, specifically requesting views from interested persons on the relationship between interstate and intrastate exemptions (Pet. App. 56a-57a). In response, several railroads operating in Illinois filed comments asserting that Illinois' standards and procedures, including the proposed exemption standard, did not accord with the federal framework.

In January 1983, following review of the comments, the ICC concluded that Section 214(b) required Illinois to adopt ICC exemptions ordered under Section 213. 367 I.C.C. 149 (1983); Pet. App. 40a-53a.The ICC, relying on the legislative history of Section 214, concluded that the certification decision must turn on whether the "objectives sought to be accomplished by Congress in the Staggers Act are thoroughly reflected in State standards and procedures" (Pet. App. 42a). The ICC observed that Section 213 expressed an "important cornerstone" of the Staggers Act requiring the ICC to "aggressively pursue exemptions from remaining regulation where warranted" (Pet. App. 47a). In light of the "the goals of the Staggers Act, the rail transportation policy, and serious practical considerations," the

ICC concluded that "once a particular category of traffic is exempted by the [ICC], this becomes a standard from which States cannot deviate" (Pet. App. 46a).

The ICC, invoking its knowledge of the interstate and intrastate markets, stated that "it is difficult to conceive of a situation where a State should continue regulation * * * where the [ICC], based on its own record, and under the same statutory criteria to be used by the States, has already determined that an exemption is warranted" (Pet. App. 48a). The ICC noted that, in all events, it would consider requests to rescind or limit an exemption in light of the "theoretical possibility that, as to a particular exemption, conditions in a State could be unique" (Pet. App. 48a-49a). The ICC "unconditionally" certified Illinois to regulate intrastate rail traffic pursuant to its proposed regulations provided Illinois changed its exemption proposal as well as two other proposals that are not at issue in the present case (Pet. App. 52a). Two members dissented.

3. The court of appeals affirmed the Commission's decision (Pet. App. 1a-37a). The court first recognized that an expert agency is entitled to great deference in interpreting a statute that it is charged to implement, citing *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); and *EPA* v. *National Crushed Stone Association,* 449 U.S. 64, 83 (1980) (Pet. App. 11a-17a).[4] The court then determined that the ICC's construction of the Staggers Act was reasonable (Pet. App. 17a-22a).

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[4]In rejecting Illinois' contention that the ICC's interpretation was not entitled to the deference ordinarily accorded an agency's interpretation of its statute, the court relied on the ICC's obligation to implement a new statute, the thoroughness of the ICC's consideration, the great discretion accorded the agency under the Staggers Act, and the need for application of agency expertise (Pet. App. 11a-14a).

The court of appeals agreed that the ICC's certification decision must turn on whether the state standards and procedures are consistent with the policies and objectives of federal law. Recognizing the "overriding importance of the exemption provisions," the court concluded that the Act envisioned that states would give immediate and automatic effect to federal exemptions (Pet. App. 19a). It thus agreed that ICC exemption orders were standards that states were obliged to follow (*id.* at 18a). It noted (*ibid.*) that prior construction of Section 214's term "standards and procedures" by two other circuits "would *a fortiori* support our narrower holding with respect to exemptions," citing *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346, 354-355 (3d Cir. 1983), and *Illinois Central Gulf R.R.* v. *ICC*, 702 F.2d 111, 115 (7th Cir. 1983).

The court rejected Illinois' contention that states had a statutory entitlement to render independent exemption decisions (Pet. App. 19a) and upheld "the ICC's judgment that the smooth and effective operation of [the exemption] procedures would be threatened by independent State exemption procedures" (*id.* at 22a). The court also rejected Illinois' constitutional challenge to the Staggers Act's certification procedures, following the Fifth Circuit's decision in *Texas* v. *United States*, 730 F.2d 339 (1984), cert. denied, No. 83-2102 (Oct. 9, 1984). Pet. App. 22a-25a.

Judge Scalia dissented. He argued that the ICC must certify state standards and procedures if they conform to "principle[s] of general application regarding * * * the national transportation policy" contained in the Staggers Act (Pet. App. 30a). In his view, ICC rulings on specific exemptions, despite their nationwide application to interstate commerce, do not constitute principles of general application to which states must adhere.

ARGUMENT

The court of appeals correctly affirmed the ICC's interpretation of its responsibilities in administering the state certification procedures of the Staggers Rail Act. The court's holding does not conflict with any decision of this Court and is consistent with the decisions of other courts of appeals. The case, which turns on a rather narrow question of statutory construction by the agency charged with administering the statute, does not warrant this Court's review.

1. Petitioners engage in an extensive initial argument that the court of appeals departs from a "traditional preemption analysis" (Pet. 12). At bottom, they object to the court's observation that the Staggers Act "totally preempted State authority * * * then restored some as a matter of legislative grace" (see Pet. 12-13). They agree with Judge Scalia, in dissent, that the Act should instead be characterized as partially preempting state authority (*ibid.*; Pet. App. 27a).

While these competing characterizations might suggest a nice question of phraseology, they do not present an issue for this Court's review. As this Court has repeatedly stressed, it "reviews judgments, not statements in opinions." *E.g., Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956). All agree that the Staggers Act retains some role for the states in regulating intrastate rail transportation. The relevant question is whether the ICC correctly interpreted the Section 214(b) certification provisions to require state recognition of the ICC's exemption orders when states regulate the intrastate traffic of interstate railroads. The court of appeals' judgment correctly resolved that question and dispenses with any need for this Court's review.

2. Petitioners, in their second argument, do raise a more specific challenge to the court's decision. They recognize that Section 214(b) requires the ICC to refuse certification

to any state that proposes regulatory standards and procedures that are not in "accordance" with federal standards and procedures (Pet. 18). See 49 U.S.C. 11501(b)(3)(A). They contend, however, that states need not adhere to ICC exemption orders, entered pursuant to Section 213, because these orders are not federal standards. The court of appeals properly rejected that argument.

As the court observed (Pet. App. 18a), other courts of appeals have broadly concluded that Section 214's term "standards and procedures" generally includes ICC decisions and orders. For example, the Third Circuit has stated:

> We hold that the phrase "standards and procedures" in section 11501(c) refers to standards and procedures promulgated and interpreted in decisions and orders of the ICC as well as those standards or procedures expressly incorporated in the Interstate Commerce Act.

Wheeling-Pittsburgh Steel Corp. v. *ICC,* 723 F.2d 346, 354-355 (1983). See also *Texas* v. *United States,* 730 F.2d 409, 418 (5th Cir. 1984), modified, 749 F.2d 1144 (5th Cir. 1985), cert. denied, No. 84-1712 (June 24, 1985); *Utah Power & Light Co.* v. *ICC,* 747 F.2d 721, 737 (1984), supplemented on rehearing, 764 F.2d 865 (D.C. Cir. 1985); *Illinois Central Gulf R.R.* v. *ICC,* 702 F.2d 111, 115 (7th Cir. 1983). Petitioners attempt (Pet. 20) to distinguish *Wheeling* and *Illinois Central* on the ground that they involve an interpretation of Section 214(c) (94 Stat. 1915) rather than Section 214(b). See 49 U.S.C. 11501(c); Pet. App. 110a-111a. However, there is no basis for believing that Congress (94 Stat. 1915) intended the term "standards and procedures" to have different meanings in two subsections of the same statutory provision.

Even if viewed as a question of first impression, the court of appeals' decision is clearly correct. The Staggers Act does not define the term "standards and procedures." Thus, the

court properly concluded that the ICC, charged with administering this new statute, was entitled to considerable deference in determining the scope of the term. *E.g., Chemical Manufacturers Ass'n* v. *NRDC,* No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Chevron U.S.A. Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984), slip op. 4-7. The court properly identified the issue as whether the ICC's interpretation was reasonable (Pet. App. 11a-17a).

Beyond question, the ICC's interpretation is "sufficiently rational * * * to preclude a court from substituting its judgment for that of [the agency]." *Chemical Manufacturers,* slip op. 8-9. The ICC based its interpretation on the legislative history of the Act. It found that Congress expected the ICC to exercise its Section 214 certification powers " 'to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals' " (Pet App. 42a, quoting H.R. Conf. Rep. 96-1430, *supra,* at 106). It also found that Congress considered the ICC's broad exemption authority under Section 213 an "important cornerstone" of the Act (Pet. App. 47a, citing the H.R. Conf. Rep. 96-1430, *supra,* at 105; see also H.R. Rep. 96-1035, *supra,* at 60). The ICC, familiar with the intricacies of the regulatory regimes, reasoned that "Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the [ICC]" (Pet. App. 47a). The ICC therefore concluded, quite reasonably, that Congress intended the term "federal standards and procedures" to include the nationwide principles embodied by ICC exemption orders.

The court of appeals noted that the ICC's interpretation of the undefined statutory term "standards and procedures" was solidly supported by legislative history and the ICC's understanding of the marketplace (Pet. App. 17a-22a). It

also recognized that prior judicial construction of the term "would a fortiori support our narrower holding" (Pet. App. 18a). Under these circumstances, the court properly concluded that the ICC's interpretation was entitled to controlling weight over other arguably plausible constructions. See, *e.g., Chevron,* slip op. 5-6.[5]

At bottom, petitioners urge that an interpretation of a statutory term, determined by the expert agency charged with administering the statute and consistent with the opinions of four courts of appeals, should be discarded. Their challenge clearly does not merit this Court's attention.

3. Petitioners raise two other challenges to the Court's decision. First, petitioners quibble with a passing observation of the court (Pet. App. 21a) that the ICC could conceivably apply its Section 213 exemption powers directly to exempt rail traffic from Section 214 certification procedures (Pet. 21-22). Even if this observation were inaccurate, it is clearly dicta that did not control the court's judgment. Once again, petitioners have ignored this Court's admonition that it "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U.S. at 297.

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[5]Even if it be assumed that the ICC and the courts all erred in interpreting the term "standards and procedures" to include ICC orders, the ICC was still justified in refusing to certify Illinois' proposed standard permitting noncompliance with ICC exemptions. The ICC's opinion can also be read as holding that the Illinois proposal was not "in accordance" with the statutory exemption standards set forth in Section 213 because it substantially interfered with the ICC's implementation of the Section's goals (see Pet. App. 46a-48a). Certainly the ICC has broad discretion to determine whether the state standards accord with the statutory standards of the Staggers Act.

Second, petitioners claim (Pet. 22-23) that the ICC's interpretation of Section 214 violates the Tenth Amendment by trenching upon state rights. The petitioners provide no support for this claim beyond a cryptic citation to *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981). That case, far from supporting (or even discussing) a Tenth Amendment claim, upheld the Federal Election Commission's construction of the Federal Election Campaign Act (454 U.S. at 32). Petitioners' vague and unsupported Tenth Amendment claim appears to be no more than an attempt to dress a statutory question in constitutional garb. The court properly dismissed the claim as meritless (Pet. App. 22a). It does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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